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No. 00-___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RONALD PAGAN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether 18 U.S.C. §1959, the "Violent Crimes In Aid Of Racketeering" statute ("VCAR"), is unconstitutionally vague on its face and as applied to Petitioner.

Whether VCAR is unconstitutional on its face and/or as applied to Petitioner, in that the fundamental premise upon which federal jurisdiction was based is flawed, and moreover, Congress does not have the power to extend federal jurisdiction to non-economic violent crimes that do not, in themselves, substantially affect interstate commerce.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Rubin Feliciano and Nelson Gonzalez were co-defendants of Petitioner at trial, and the court of appeals affirmed their convictions in the same opinion in which it affirmed Petitioner's appeal.

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In the Supreme Court of the United States

No.

RONALD PAGAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Ronald Pagan, respectfully petitions for writ of certiorari to review the judgement of the United States Court Of Appeals For The Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, A -1 to A- 52) is reported as United States v. Feliciano, 223 F.3d 102 (2d Cir. 2000).

JURISDICTION

The judgement of the court of appeals was entered on August 16, 2000. Petitions for rehearing were denied on November 13, 2000. (A - 53) The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8 of the United States Constitution, the "Commerce Clause," provides: "The Congress shall have the Power to... regulate Commerce with...and among the several states."

The First Amendment to the United States Constitution provides in relevant part that: "Congress shall make no law...abridging the freedom of speech, or the right of the people peacefully to assemble..."

The Fifth Amendment to the United States Constitution provides in relevant part that: "No person shall be...deprived of life, liberty, or property, without due process of law..."

The Sixth Amendment to the United States Constitution provides in relevant part that: "In all criminal prosecutions the accused shall be...informed of the nature and cause of the accusation..."

The Fourteenth Amendment to the United States Constitution provides in relevant part that: "All persons [shall enjoy] the equal protection of the laws."

STATEMENT OF THE CASE

On February 2, 1999, following trial to a jury in the United States District Court for the District of Connecticut, Petitioner was convicted of one count of committing a Violent

Crime In Aid Of Racketeering (Conspiracy to Commit Murder) in violation of 18 U.S.C. §1959 (a)(5), one count of committing a Violent Crime In Aid Of Racketeering (Murder) and Aiding and Abetting in violation of 18 U.S.C. §1959 (a)(1) and 2, and one count of Using or Carrying A Firearm During And In Relation to a Crime of Violence and Aiding and Abetting in violation of 18 U.S.C. §924 (c)(1) and 2.

Petitioner Pagan, said to be a member of a gang known as the "Los Solidos," was convicted of being an accomplice to a gang related killing on March 24, 1997 in Meriden, Connecticut. The victim, Edwin Ramos, was a newly initiated member of the "Los Solidos," and according to the government's evidence, was killed as the result of an intra-gang dispute. Ramos, a former member of a rival gang, the "Latin Kings," had been given a gun and a bullet proof vest by Nelson Gonzalez, the president of the Los Solidos' Meriden chapter so that he might protect himself from possible retaliation by Latin King members. However, Ramos soon thereafter sold the gun and vest to by narcotics for himself. When these facts were discovered by Gonzalez he ordered Rubin Feliciano, another member of the Solidos to kill Ramos.

On the evening of March 24, 1997, Feliciano accompanied by Alex Rivera and the Petitioner picked up Alex Rivera. They drove around for a while talking and taking drugs. Eventually, they stopped the car in a remote area. All four men exited the automobile and began talking. Soon thereafter, Feliciano confronted Ramos and asked him what he had done with the gun that Gonzalez had given him. Ramos said he didn't know, that he might have lost it. With that, Feliciano pulled his gun and shot Ramos once. Ramos died from the

gunshot wound.

When the trial court charged the jury, it gave the following instruction, over defense objection, on the interstate commerce element of VCAR;

> The third element that you must find beyond a reasonable doubt is that the enterprise itself, namely the Los Solidos, or the racketeering activities of those associated with it, had some effect upon interstate or foreign commerce. **The effect on interstate or foreign commerce could have occurred in any way, and it need only be minimal**. It is not necessary that you find that a substantial affect on interstate or foreign commerce occurred...**So long as the activities in furtherance of the enterprise affected interstate or foreign commerce in some minimal way, you may find that this element has been satisfied**. It is sufficient, for example, that in the course of the racketeering activities, members of the enterprise sold narcotics. (emphasis supplied)

On appeal, Petitioner argued that the VCAR statute was unconstitutionally vague, both on its face and as applied. In addition, Petitioner argued that the interstate commerce element of VCAR was unconstitutional on its face and as applied. The arguments were rejected by the court of appeals.

REASONS FOR GRANTING THE PETITION

I. The VCAR Statute Is Unconstitutional On its Face, In That It Fails To Provide Sufficient Notice Of What Conduct Is Prohibited, And It Was Unconstitutionally Applied In The Underlying Prosecution And Appeal

An independent and indispensable element of VCAR, which the government must prove beyond a reasonable doubt, is that the predicate act of violence allegedly committed by the person charged - was committed either in consideration of something of pecuniary value or in order to gain entrance to or maintain or increase his position in - "**an enterprise engaged in racketeering activity**." United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992), ["the government (is) required to prove beyond a reasonable doubt... that the enterprise was engaged in racketeering activity as defined in RICO."]

It is this VCAR element, that the enterprise must be "engaged in racketeering activity," which creates truly insoluble problems of statutory construction and application. Simply put, the reason that the VCAR statute is constitutionally vague on its face, is because it is quite literally impossible to tell from the language of the statute what proof is required to satisfy this element. As will be demonstrated below, VCAR "fails to establish any, much less legally adequate, (1) relational, (2) qantifiable, or (3) temporal standards. Accordingly, it is so vague and that it leaves the public uncertain as to the conduct it prohibits, and is inadequate to "guard against the arbitrary deprivation of liberty interests." As a result, the statute fails to

pass constitutional muster. See, Chicago v. Morales, 527 U.S. 41, 56 -57, 119 S. Ct. 1849 (1999)

In enacting VCAR, it is quite clear that what its proponents really sought to create (and this assertion is readily confirmed by its legislative history, see n. 5, infra) was a statute that criminalized the commission of a violent crime in connection with an *organized crime enterprise*. However for cogent reasons (see, n. 4, infra), VCAR's supporters felt such a statute would be unconstitutional. Accordingly, they attempted to do indirectly what they could not do directly. Thus emerged the incongruous concept of an "enterprise engaged in racketeering activity," (read - "*organized crime enterprise*"). Not surprisingly, VCAR - a mutation of RICO - became the quintessential "camel" - "a horse designed by a committee."

a. **VCAR Is Constitutionally Vague Because It Fails To Define How The Various Elements Thereof Must Relate To One Another.**

Beginning with the "relational" deficiencies of the VCAR, the first question that emerges is whose racketeering act(s) count in determining whether the enterprise is engaged in racketeering activity. That is to say, an "enterprise"as a theoretical construct, does not itself engage in racketeering acts, someone must do so on its behalf.[1] Thus, the first problem

[1] As the court noted in United States v. Private Sanitation Industry Ass'n., 793 F.Supp. 1114, 1128 (E.D.N.Y. 1992); "At this point a threshold observation must be made about *United States v. Minicone, 960 F.2d 1099 (2d Cir. 1992)*, cert. denied, -- *U.S. --, 112 S. Ct. 1511, 117 L. Ed. 2d 648*

which is manifest, is that it is impossible to tell from the statute what the required "relationship" must be between an enterprise and an individual somehow associated therewith, in order for that individual's racketeering act(s) to be properly included in the calculus for determining whether the "enterprise was engaged in racketeering activity."

This statutory defect presents a situation not unlike that faced in interpreting the provisions of the RICO statute, as to who was legally capable of "conducting the affairs" of an enterprise. In Reves v. Ernst & Young, 507 U.S. 170, 177, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993) this Court reasoned that in order to "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs," it was only those person(s) capable of influencing the "operation and management" of the enterprise that had sufficient relationship to the enterprise to have the capacity to direct its affairs.

Not surprisingly, this "operation and management" test, crafted by the Court in Reves, is akin to generally accepted standards as to whose individual acts can be imputed to, and thereby result in, criminal liability to corporation.[2]

(1992). There, the Second Circuit stated that 'proof of a RICO violation pursuant to § 1962(c) requires a showing that an "enterprise" engaged in a "pattern" of racketeering activity'... This statement is almost certainly an inadvertence: Section 1962(c) declares it illegal for a person - not for an enterprise - to engage in a pattern of racketeering activity."

[2] As the court in Grace v. Nissan, 76 F. Supp. 2d 1083, 1088 n.10 (D. Ore. 1999) observed, the standard of corporate criminal liability set forth in the American Law Institute's Model Penal Code, adopted in principle by twenty one states, is that : "(1) A corporation may be convicted

The next "relational" defect of VCAR derives from the absence of any requirement of a relationship between a racketeering act and the enterprise. That is to say, even if a qualifying "racketeering act" was committed by someone who was sufficiently "related" to the enterprise for such act to be considered, how must that act nonetheless relate to the enterprise itself. Under RICO, we know for a racketeering act to qualify for inclusion in a "pattern of racketeering activity" it must demonstrate two attributes. First, it must be "horizontally related" to the other acts said to make up the pattern. Second, it must be "vertically related" to the enterprise. [3]

However under VCAR, there is no way to determine what relationship a racketeering act must have to the enterprise in order for it to be included for the purpose of determining whether the enterprise was "engaged in racketeering activity."

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of the commission of an offense if... (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment. American Law Institute, Model Penal Code § 2.07(c)."

[3] As the Court in United States v. Long, 917 F.2d 691 (2d Cir. 1990)explained: "under Indelicato and H.J. Inc....the government must prove that two racketeering acts were related to each other ("horizontal relatedness"), as well as related to the enterprise ("vertical relatedness") and that they resulted in or posed a threat of continuity of the criminal activity." Id. at 697; accord United States v. Indelicato, 865 F.2d 1370, 1381 (2d Cir. 1989); United States v. Persico, CR-92-00351 (CPS), 1994 U.S. Dist. LEXIS 928 (E.D.N.Y. 1994); United States v. Local 1804-1, 812 F. Supp. 1303, 1315 (S.D.N.Y. 1993).

The real problems created by the lack of any relational standard between the act and the enterprise was amply demonstrated in the trial below. Defense counsel asked the trial court to instruct the jury that a racketeering act committed by someone who was purportedly a member of Los Solidos, but who committed the racketeering act for his own ends rather than in furtherance of the affairs of the enterprise, should not be considered. The trial court refused the limiting instruction.

On appeal, it is most respectfully asserted that the effort of the Court of Appeals to explain why the requested limiting instruction should not have been given, if anything, dramatically underscores just how vague VCAR is. (see, A - 25 to A - 29).

The third "relational" defect of VCAR concerns its lack of any requirement that the "racketeering acts" bear any relation to the defendant. Petitioner does not argue here that the defendant must himself commit any of racketeering act(s) - indeed the underlying violent predicate act specifically does not count toward the element that the enterprise must be engaged in racketeering activity. But for the reasons explained below there must be at a minimum, at least some knowledge of, some foreseeability, some relation between, the VCAR defendant and the racketeering acts of the enterprise.

The fact is however, under VCAR there is no requirement that the defendant being prosecuted know of, or even reasonably foresee, the commission of any racketeering act(s) by anyone associated with the enterprise - even though it is an element of the offense for which he is being prosecuted. And, since the VCAR defendant need not know of or foresee the commission of such acts, they need be part of any criminal

objective or venture that the defendant has agreed to join or advance. As a result, there is imposed upon a VCAR defendant vicarious liability for the criminal acts of others, which relate not to him, but rather exclusively to the enterprise.

In this regard, analyzing the unique mechanisms of VCAR, one finds that the statute actually creates two separate *actus reus* requirements. The first being the defendant's *actus reus,* to wit; his intentional commission of the underlying violent crime in exchange for something of pecuniary value or to gain entrance to the enterprise. The second *actus reus* requirement is that of someone other than the defendant intentionally commit a racketeering act(s).

Although there exist other statutes in which the conduct of someone other than the defendant can serve as a basis of his criminal liability - for example, a conspiracy statute or an aiding and abetting statute - there is a critical difference between liability for those offenses and for VCAR. Liability to the defendant in a conspiracy or aiding and abetting context only obtains if the defendant himself has knowingly agreed to join some form of criminal partnership and the conduct of the other person (whether the defendant knows the existence of all such other co-conspirator or not) is nonetheless; (1) known to or reasonably foreseeable to the defendant, and (2) in furtherance of a criminal agreement the defendant has entered into and endeavored to advance the goals of.

Conversely, under VCAR, liability for an indispensable element of the offense - that the "enterprise was engaged in racketeering activity" - can be proven on the basis of the conduct of another; (1) who the defendant may very well never have known of or reasonably foreseen; (2) and who committed

acts that the defendant never agreed to, knew of, or reasonably foresaw. Even if VCAR were a conspiracy statute, which it is not, under traditional conspiracy doctrine a defendant cannot be vicariously liable for any crimes beyond the reasonably foreseeable parameters of his conspiratorial agreement. And since VCAR enterprises can be entire lawful entities, such as a corporation, there is no argument for any form of "constructive knowledge" - even if criminal liability could be predicated upon such a standard, which is highly unlikely.

Once again, comparing VCAR to RICO, it is significant to note that under RICO there is no vicarious liability created between RICO co-defendants for their respective racketeering acts. As the Court in United States v. Bonnano Organized Crime Family, 683 F. Supp. 1411, 1429 (E.D.N.Y. 1988), explained:

> The defendants' alleged association with the Bonanno Organized Crime Family alone is not sufficient to attribute to each defendant all of the predicate acts. Congress specifically declined to make mere membership in an organized crime organization a RICO offense...(citations omitted) As stated in United States v. Persico, 832 F.2d 705, 714 (2d Cir. 1987), "the focus of section 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise."

In fact, when the proposed RICO statute was being debated by the Congress, serious questions were raised over whether, by passing RICO, the legislature would in effect be

creating a "status" crime.[4] Not surprisingly, on a number of occasions, and in a number of different factual contexts, RICO was challenged on this basis. Such challenges were typically predicated upon the contention that RICO's criminal liability impermissibly depended upon a person's "status"or "association" with a particular group or enterprise.

While these issues were taken quite seriously by the courts that initially dealt with them, the argument was ultimately rejected upon the reasoning that RICO did not actually punish "status" or "membership," but rather the individual conduct of the accused. "A defendant must be convicted on the basis of his own proven conduct, association is not enough. RICO does not punish 'mere association with conspirators or knowledge of (their) illegal activities; its

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[4] As noted in Moss v. Morgan Stanley Inc., 719 F.2d 5, 21 n. 17 (2d Cir. 1983). "During the House debates on RICO, Congressman Biaggi proposed an amendment that sought to limit the application of RICO to Mafia and La Cosa Nostra organizations. 116 Cong. Rec. 35,343 (1970). The amendment was vigorously attacked on constitutional grounds. Congressman Celler objected that such terms were "imprecise, uncertain, and unclear" and that mere membership in an organization should not be punished. Id. at 35,343-44 (1970). Congressman Poff (the bill's sponsor in the House) objected that such an amendment might violate the Supreme Court's rulings that struck down statutes which created status offenses, such as *Scales v. United States, 367 U.S. 203, 6 L. Ed. 2d 782, 81 S. Ct. 1469 (1961)*, and *Robinson v. California, 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962)*. 116 Cong. Rec. 35,344 (1970). Congress rejected the amendment. 116 Cong. Rec. 35,346 (1970); see Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime 59-105 (G.R. Blakey ed. 1980)." See also, H.J. Inc. v. Northwestern Bell Telephone Company, infra at 492 U.S. 245-249

proscriptions are against conduct not status.'" United States v. To, 144 F.3d 737, 746 (11th Cir. 1998); United States v. Gonzalez, 921 F.2d 1530, 1542 (11th Cir. 1991) ["RICO does not punish mere association with conspirators or knowledge of illegal activities."]; United States v. Bonanno Organized Crime Family, supra at 1429 ["The defendants' alleged association with the Bonanno organized crime family alone is not sufficient to attribute to each defendant all the predicate acts."].

However unlike RICO, VCAR was expressly designed to predicate liability upon a defendant's association and status. As the legislative history confirms:

> **Federal jurisdiction [under VCAR] should be asserted selectively based upon such factors as the type of the defendants reasonably believed to be involved...For example, the apparent involvement of organized crime figures...could indicate that Federal action was appropriate** (Id. at 3484) [5]
>
> * * *
>
> **Section 1952B (renumbered in 1988 as 18 U.S.C. §1959) proscribes contract murders and other violent crimes by organized crime figures.** Such crimes frequently do not involve interstate travel or the use of interstate facilities and are sometimes not performed for money or other pecuniary benefit, but rather **as an aspect of membership in a criminal organization**. (Id. at 3486)(emphasis supplied)

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[5] See, Senate Report No. 98-225; 98th Congress Second Session, 1984 U.S. Code Cong. & Admin. News, 3182, 3483-3487.

Thus, while VCAR seeks in part to criminalize the commission of the defendant's underlying violent crime, the single element that transforms a garden variety violent crime into a VCAR prosecution, is the defendant's association with the enterprise (and/or its members). Clearly then, under VCAR, the *sine qua non* is association with members of an enterprise that have committed unrelated criminal conduct. Because VCAR makes an individual liable for prosecution on the basis of his association with others, the statute violates the First Amendment and the Equal Protection Clause.

At this juncture it is perhaps well served to note that it is probably true that a defendant can be convicted of a federal crime without necessarily knowing all (or perhaps even any) of the facts giving rise to the so-called "jurisdictional element" of the offense.[6] However, the jurisdictional element of VCAR is

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[6] Some jurists would argue that this proposition is open to question. For example as Judge Merritt observed in his dissenting opinion in United States v. Gibson, 881 F.2d 318, 323-324 (6th Cir. 1989): "I recognize that it is often hazardous for lower federal courts to predict that the Supreme Court will reverse a 5-4 opinion [referring to the Court's opinion in United States v. Yermian, 468 U.S. 63 (1984)], but such a prediction does not require much of a leap of faith in this case. Chief Justice Rehnquist's prediction of significant confusion in the lower courts has come to pass. After Yermian, the Supreme Court has reiterated in Liparota [471 U.S. 419 (1985)] its reservations with respect to the knowledge requirement of the jurisdictional element, and in Tanner [483 U.S. 107 (1987)] it has held that the government must be the known target in § 371 fraud-against-the-government cases. The five justice majority in Yermian is no longer intact since two members of the majority are no longer on the Court, but the four dissenting members of the Court remain. Therefore, I do not think Yermian is still good law and would reverse Gibson's conviction."

the requirement that the government prove that the enterprise was "engaged in, or the activities of which affect[ed], interstate of foreign commerce."(See. §1959 [b][2]) The separate element, that the enterprise was "engaged in racketeering activity,"is a substantive element unrelated to the jurisdictional element of the statute. Accordingly, a knowing, culpable mental state must be demonstrated as to that element. Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240 (1952); Staples v. United States, 511 U.S. 600, 619-20, 114 S. Ct. 1793 (1994); United States v. X-Citement Video, Inc., 513 U.S. 64, 70-73, 115 S. Ct. 464, 467 (1994).

b. VCAR Is Unconstitutionally Vague Because It Fails to Provide Sufficient Notice Of How Many "Racketeering Acts" Must Be Committed And/Or By How Many People Associated With The Enterprise, Before The Enterprise Can Be Said To Be "Engaged In Racketeering Activity."

VCAR provides no reference whatever as to how many racketeering acts must be proven, and/or how many members of the purported enterprise must commit such acts in order to establish that the "enterprise was engaged in racketeering activity." Yet again, this defect raises problems not dissimilar to those presented by RICO. (See, H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229, 109 S.Ct. 2732 [1989], and this Court's discussion of the quantitative requirements of a "pattern of racketeering activity").

To demonstrate just how real this problem is with regard to VCAR, consider the divergence of opinion (and/or inability to define the parameters of this element) revealed in the four

decisions discussed below.

Beginning with the opinion in United States v. Soler, ___F.Supp2d___, 1998 U.S. Dist. LEXIS 1998 (S.D.N.Y. 1998), the defendant had argued that the government had to prove the commission of "predicate acts" (plural) in order to establish that the enterprise was in fact "engaged in racketeering activity." Rejecting the defendant's argument, the district court went on to hold that not only was it unnecessary for the government to prove that the enterprise had committed a "pattern or racketeering activity," but it was not even necessary to prove that anyone connected with the enterprise ever committed even a single "racketeering act." As the court stated:

> During the trial, the parties discussed whether the Government was required to prove predicate acts under § 1959. The Government argued that such proof was not necessary... **This Court agreed, based on the plan language of the statute, that proof of a predicate act...was not necessary.**
>
> Following the trial, Soler filed a letter, pro se, in which he argued that the Court failed to instruct the jury of the need to find the commission of predicate acts of racketeering activity in order to convict under § 1959. In an opinion dated December 24, 1996, this Court rejected Soler's argument.
>
> "Predicate acts" are a necessary element of an 18 U.S.C. §1962 (a)-(c) charge, which forbids a variety of actions conducted through a "pattern of racketeering activity."

> Section 1959, by contrast, outlaws violent crime committed in order to gain membership or increase one's position in "an enterprise engaged in racketeering activity." **Because Section 1959 does not require a "pattern" of racketeering activity, it does not require that the government prove [any] predicate acts."** (emphasis supplied)

It is noted parenthetically that Petitioner agrees that there is no requirement within the VCAR statute that a "pattern" of racketeering activity be proven, he does assert however that some number of racketeering acts, possessing some attributes of relationship and continuity must be required, and that the failure of VCAR to set forth these requirements renders the statute impermissibly vague.

Next, is the decision in United States v. Cutolo, 861 F.Supp. 1142, 1146 (E.D.N.Y. 1994). Most respectfully, the court in Cutolo, having once recognized the problem, essentially side stepped it. As the district court wrote:

> §1959 does not spell out how many crimes must be committed and by whom to satisfy that section's prerequisite that the "enterprise" be "engaged" in such activity...Presumably §1959 does not apply where such persons committed only a single crime. The word "engaged" implies more than that.

The third court to comment upon VCAR's lack of any quantifiable standards to which one might refer in order to determine how many racketeering acts had to be committed before it could be said that the "enterprise was engaged in racketeering activity," was the decision in United States v. Booth, ___F.Supp.2d___, 1999 U.S. Dist. LEXIS 19190 (S.D.N.Y. 1999). In Booth, like Cutolo, the court acknowledged this self-evident defect in the statute, yet it too, offered no solution. As the court noted:

> Booth also argues that § 1959 is unconstitutionally vague because the phrase 'enterprise engaged in racketeering activity' is under-defined. '[U]nlike RICO,' he argues, 'VCAR fails to provide any quantifiable language which would provide a defendant, a court or most importantly, a petit jury, with a reliable (and consistent) basis upon which to determine when... 'the government has proved that an 'enterprise [was] engaged in racketeering activity.' He cites, by way of contrast, the continuity and relatedness requirements that courts have developed as interpretations of RICO's requirement of a 'pattern' of racketeering activity. Booth argues that the absence of similar limiting constructions in the VCAR context deprives him, as well as all other potential defendants, of adequate notice as to what is prohibited and exposes them to the risk of arbitrary enforcement.
>
> **Similarly, here, Booth is correct to note that § 1959 fails to impose either quantifiable, or temporal,**

requirements in defining when an enterprise is engaged in racketeering activity. But we do not believe that the Constitution requires it to do so. The text of the statute indicates that Congress intended to include any of the enumerated violent acts committed at the behest of, or to gain or maintain a position in, **any enterprise at least some of whose members are engaged in at least some racketeering activity.**[7] **Although this, too, might be broad, we do not believe that it is vague.**(emphasis supplied)

The fourth and final discussion of the failure of VCAR to provide any quantifiable standards in terms of the number of

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[7] The district court's conclusions in Booth, that when Congress enacted the VCAR element that the enterprise had to be "engaged in racketeering activity" it purposely did so to make that element as broad as possible, is not confirmed by the legislative history.(See, Senate Report No. 98-225; 98th Congress Second Session, 1984 U.S. Code Cong. & Admin. News, 3182, 3483.) But regardless, it is not the Congress who is the final arbiter of whether a statute provides sufficient constitutional "notice."As this Court noted in United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740 (2000): "No doubt the political branches have a role in interpreting and applying the Constitution, but ever since Marbury this Court has remained the ultimate expositor of the constitutional text. As we emphasized in United States v. Nixon, 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974), 'In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others ...Many decisions of this Court, however, have unequivocally reaffirmed the holding of Marbury...that 'it is emphatically the province and duty of the judicial department to say what the law is.'" Id. 120 S.Ct. at 1753.

racketeering acts that need be proved is the district court's decision in United States v. Garfinkle, 842 F.Supp 1284, 1291-1292, aff'd United States v. Bracy, 67 F.3d 1421, 1429 (9th Cir. 1995).

In Garfinkle the court began by also acknowledging that the VCAR element that the enterprise must be "engaged in racketeering activity," cannot be determined by reference to the statute:

> There is no statutory definition of the phrase "engaged in" racketeering activity. Nor could we find any case law directly on point. The treatment of the phrase "engaged in" in the case law, suggests that the courts have not yet given a strict or limited definition but have allowed the phrase its ordinary meaning...
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> * * *
>
> The language regarding 'an enterprise engaged in racketeering activity' should be construed to require some proof that the enterprise as an entity is engaged in racketeering activity, or generally that its members and associates are engaged in racketeering activity in such a way that it can be attributed to the enterprise.

In the four decisions above - that have attempted to determine how many racketeering acts must be committed before it can be said that the "enterprise was engaged in racketeering activity" - one court says than no racketeering acts need be proven, and three courts fundamentally admit that, semantics aside, they have no idea. Thus as Soler, Cutolo, Booth, and Garfinkle fairly demonstrate, even federal judges

well versed in the operation and application of complex multi-element federal criminal statutes, not only concede that this VCAR element cannot be defined by reference to the statute, but most respectfully, cannot reach consensus or even offer an reasonable explanation of how the element ought to be construed or applied. Yet these are the very judges that must explain and instruct lay juries on how they are to apply VCAR in determining a person's guilt or innocence. That at least four federal district court judges cannot say with any degree of certainty what evidence is legally and/or factually sufficient to establish the VCAR element that the enterprise is "engaged in racketeering activity," makes a compelling case for the finding that VCAR is constitutionally vague.

c. VCAR is Constitutionally Vague Because It Provides No Temporal Parameters.

At the risk of overstating one's position, assume that 15 years ago, a member of some otherwise legitimate enterprise - a corporation for example - committed a single violation of 18 U.S.C. §1544 (Misuse of a Passport - a racketeering predicate under §1961[1][B]). One could argue, and there is nothing in VCAR to the contrary, that "enterprise"was an "enterprise engaged in racketeering activity." This is so because there are no temporal restrictions as to when the racketeering act(s) engaged in by the enterprise must be committed in relation to the underlying VCAR predicate crime.

If one reasons that under VCAR, racketeering acts committed before the predicate violent crime count toward determining whether the enterprise was engaged in racketeering

activity - then how far in the past can the racketeering act(s) be, and still be included in the calculus for this element. Further, must there be some equivalent to the RICO pattern requirements of horizontal, vertical relatedness and/or continuity with respect to such acts. Alternatively, must the enterprise be simultaneously "engaged in racketeering activity," at the time the violent crime is committed (a construction suggested by the language of §1959). Finally, may the necessary racketeering activity take place after the violent predicate act.

Once again, to demonstrate these problems in real case context, consider the opinion in United States v. Garfinkle, supra at 1291-1292, As the district court wrote:

> [O]ur own every day understanding of the word [engaged] lead us to belief that for an enterprise to be 'engaged' in racketeering activity has a more transitory quality than the phrase "pattern of racketeering activity" as defined by the Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989).* The term 'engaged in' has a temporary quality implying that it is not necessary to find the enterprise is likely to continue to participate in racketeering activities. Nor does the term 'engaged in' require a showing that any racketeering activities conducted by the enterprise are related to each other.
>
> For an 'enterprise' to be 'engaged in' racketeering activity we think it is enough to show that the 'enterprise' is currently involved in the commission of an act of racketeering activity. By this we don't mean

> that the enterprise must be committing an act of racketeering activity at the same exact instant as the underlying crime of violence. **We only mean that the enterprise must have committed or is planning to commit some racketeering activity within a period of time short enough under the circumstances so that it is fair to deem the enterprise as 'engaged in racketeering activity.'**
>
> **Thus, it would be possible for an otherwise legitimate enterprise which engages in a single act of racketeering activity to be deemed 'engaged in racketeering activity' for a short period of time on either side of the actual commission of the racketeering activity...We do not define the outer limits of time during which an 'enterprise' may be fairly said to be 'engaged in' racketeering activity.** (emphasis supplied)

The Court in Garfinkle would find that a defendant could be guilty of VCAR if there was a showing that the enterprise was "*planning to commit* some racketeering activity within a period of time short" of the defendant's violent act. A statute that leads a federal district judge to reach such conclusions, based most respectfully, entirely on his own subjective view as to what would seem reasonable to him, cannot possibly meet constitutional standards.

II. 18 U.S.C. §1959 Is Unconstitutional on its Face, And As It Was Applied In This Case. The Legislative Premise Upon Which Federal Jurisdiction Of VCAR Is Founded Is Flawed.

As the legislative history of VCAR confirms, Congress expressly anchored its assertion of jurisdiction to its contention that the activities of "organized crime" were matters which, in the aggregate, had a sufficient affect upon interstate commerce to justify federal intervention into non-economic violent crimes, traditionally the exclusive bailiwick of state and/or local prosecutors. As Senate Report No. 98-225 sets forth:[13]

> **"[T]he Committee is aware of the concerns of local prosecutors with respect to the creation of concurrent Federal jurisdiction in an area, namely murder cases, which has heretofore been the almost exclusive responsibility of State and local authorities** (Id at 3483)...[T]he Committee concluded that the need for Federal jurisdiction is clear, in view of **the Federal government's strong interest, as recognized in existing statutes, in suppressing the activities of organized criminal enterprises.** (Id. at 3484)... [VCAR] extends to [crimes] committed for anything of

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[13] See, Senate Report No. 98-225; 98th Congress Second Session, 1984 U.S. Code Cong. & Admin. News, 3182, 3483-3487.

pecuniary value or for the purpose of **gaining entrance into or maintaining or increasing one's position in an organized crime group.** Id. 3484)...**Section 1952B [VCAR] proscribes... violent crimes by organized crime figures. Such crimes frequently do not involve interstate travel or the use of interstate facilities and are sometimes not performed for money or other direct pecuniary benefit, but rather as an aspect of membership in a criminal organization.** (Id. 3486) (emphasis supplied)

The fatal defect in the jurisdictional scheme of VCAR however, is that Congress erroneously equated an "enterprise engaged in racketeering activity" as being synonymous with an "organized crime enterprise" (or as it is sometimes described, a "racketeering enterprise"). It did so because it reasoned that the crimes enumerated in §1961 of RICO - so called "racketeering activities" - were the type of crimes that organized crime enterprises "engaged in,"[14] and therefore, by

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[14] This reasoning derived from the conceptual thinking of the proponents of RICO. As the court in United States v. Bledsoe, 674 F.2d 647,662-663 (8th Cir. 1982) noted: "[RICO] was not intended to reach any criminals who merely associate together and perpetrate two of the specified crimes, **rather it was aimed at 'organized crime.'**(Id at 662)...**The statute is an attack on organized crime, but it utilizes a per se approach.** Thus Senator McClellan, the bill's principal sponsor, stated that **the crimes enumerated in the definition of racketeering activity are not committed only by participants in organized crime, but argued that they are 'characteristic of organized crime.** '(emphasis supplied) McClellan, The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?,

incorporating the requirement that the VCAR enterprise had to be "engaged in racketeering activity," the language of the statute ensured that the jurisdictional predicate, - *suppressing the activities of organized criminal enterprises* - would be present in any VCAR prosecution.

This purported jurisdictional footing is in reality a fallacy since there is nothing in the language of the statute that requires, much less guarantees, that the VCAR "enterprise," or the activities thereof, will relate in any way to "organized crime," or the members or activities thereof.

These flaws in both the conceptual basis and operation of the jurisdictional element of VCAR manifested themselves in the instant case. At bar, the Second Circuit upheld VCAR's purported commerce clause jurisdiction precisely upon the premise that; **"it is evident that Congress enacted section 1959 in view of the 'Federal Government's strong interest... in suppressing the activities of organized criminal enterprises'... '[Because] any predicate murder [under1959 must] bear a strong relationship to racketeering activity that affects interstate commerce, it does not risk improperly making purely local crimes a matter of federal concern."** (A - 34 & 35) (emphasis supplied)

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46 Notre Dame Law. 55, 142-43 (1970). McClellan observes: 'The danger that a commission of such offenses by other individuals would subject them to proceedings under title IX is [small]...Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX. Id. at 144." Id at 663

Most respectfully, this reasoning is entirely flawed. First, there is no statutory requirement in VCAR that the jury or anyone else, find any "relationship" (much less a "strong one") between the "predicate murder" (or whatever the particular VCAR predicate act of violence may be) and the enterprise's "racketeering activity." Second, unlike RICO, there is no requirement in VCAR that the "racketeering activity" somehow advance the goals of the enterprise, or that the affairs of the VCAR enterprise be "directly or indirectly...conduct[ed]," through racketeering activity. In fact, as the court in Garfinkel observed; "*it would be possible for an otherwise legitimate enterprise which engages in a single act of racketeering activity to be deemed 'engaged in racketeering activity' for a short period of time..*" So even if one establishes that a particular VCAR "enterprise" was in fact "engaged in racketeering activities," that wouldn't support the necessary corollary that such an enterprise was an "organized crime enterprise," or otherwise engaged in organized crime activities or offenses.

Moreover, the Second Circuit's contention that it is the enterprise's "*racketeering activity that affects interstate commerce,*" is equally unsupportable. There is nothing in the VCAR statute that requires any finding that the "activities of [the enterprise] which affect interstate commerce," are, or must be, the enterprise's "racketeering activities." A finding that a VCAR enterprise's activities affect interstate commerce could be predicated on entirely unrelated, and wholly lawful activities. For example, in a RICO context this Court observed in United States v. Robertson, 514 U.S. 669,672, 115 S. Ct. 1732 (1995), that any corporation that, "engage[s] in the [lawful] production, distribution, or acquisition of goods or services in interstate

commerce," is "engaged in interstate commerce."

For these same reasons, the application of "aggregation theory" in order to find a "substantial affect upon interstate commerce," is not warranted under VCAR. As this Court held in United States v. Morrison, supra., "[w]e accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Id 667.

Nevertheless, aggregation theory is applied under VCAR[15] on the contention that it is not the predicate noneconomic violent crime(s) that are being aggregated, but the overall effects of the VCAR enterprise's purported organized crime activities. However, as discussed above, since there is no requirement that the basis upon which a VCAR enterprise may be found to affect interstate commerce, or be in any way linked to racketeering activities or organized crime activities, the entire underlying premise collapses under its own weight. Moreover, since the number of racketeering acts necessary to support the element that the enterprise was "engaged in racketeering activity" is not quantified in VCAR - and at least one court has suggested a single act might well satisfy this statutory element - nothing assures that the affect would be anything but *de minimums*. Finally, since there are no temporal

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[15] See, for example, United States v. Riley, 985 F. Supp. 405 (S.D.N.Y. 1997) ["In view of the potential for organized criminal enterprises to affect interstate commerce through their use of violence, I find that there is a rational basis for Congress's determination that violence committed for racketeering enterprises, when viewed in the aggregate, substantially affects interstate commerce." Id. 408]

requirements as to when a racketeering act must occur in relation to either the predicate violent act, or the period when the enterprise was engaged in interstate commerce, the statutory scheme fails for these reasons too.

The second basis upon which the Second Circuit found commerce clause jurisdiction was justified for VCAR, was that; *"[t]he substantial effect requirement is satisfied when criminal statutes contain a jurisdictional element, which ensures through case-by-case inquiry, that the prohibited act affects interstate commerce."* United States v. Torres, 129 F.3d 710, 717 (2d Cir. 1997) See A - 33.

However, the mere fact that a statute may contain its own internal "jurisdictional element," while a matter to be considered in the overall equation, is hardly a conclusive factor - in and of itself - that the conduct that the statute purports to interdict has a sufficiently "substantial affect" on interstate commerce to warrant federal jurisdiction. See, United States v. Rodia, 194 F.3d 465, 472-473 (3rd Cir. 1999) [16]

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[16] As the court in United States v. Corp, 236 F.3d 325, (6th Cir. 20000 noted; "[Even the] government concedes that "the presence of such a jurisdictional requirement does not automatically qualify a statute as constitutional under the Commerce Clause. . . ." A hard and fast rule that the presence of a jurisdictional element automatically ensures the constitutionality of a statute ignores the fact that the connection between the activity regulated and the jurisdictional hook may be so attenuated as to fail to guarantee that the activity regulated has a substantial effect on interstate commerce. See *Lopez, 514 U.S. at 561* (implying that jurisdictional elements are useful only when they can ensure, through a case-by-case inquiry, that the regulated activity affects interstate commerce); *United States v. Jones, 178 F.3d 479, 480 (7th Cir. 1999)* (noting that the jurisdictional element of

For the reasons set forth above it is respectfully asserted that VCAR is constitutionally vague on its face and as it was applied in the instant case. Moreover, the court lacked jurisdiction to prosecute the defendant for violations of 18 U.S.C. § 1959.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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§ 844(i), even if proven by the government, did not establish a substantial connection to interstate commerce; and therefore, looking beyond the jurisdictional element to assess the statute's constitutionality)."